

## REMARKS

Claims 1-14 are pending. Claims 1-5, 9-11 are currently amended with respect to the earlier versions of these claims that is of record. Claim 2 is currently amended to include an additional limitation that said first salt and second salt are present in an aqueous solution at a concentration of at least 20mM each. This amendment finds support in the original specification, see U.S. Patent NO. 5,997,910, Col. 3, lines 50-52 and Col. 4, lines 48-52 and amendments to the Specification submitted along with the reissue application filed on October 19, 2001. Claims 3-5 and 9-11 are currently amended in response to the Examiner's rejections.

### I. Specification – Amendment

The Examiner reasons that the requested amendments to the Specification are properly correctable by certificate of correction, and finds that this type of correction is not properly submitted in reissue. Applicant's attorney respectfully traverses this basis for refusal to enter. Reissue is proper so long as there is at least one basis that supports reissue under 37 CFR 1.175. MPEP 1402 specifically states that although corrections to a patent that is one of spelling, or grammar, or a typographical, editorial or clerical error alone do not provide a basis for reissue, these corrections may be included in a reissue application, where a 35 U.S.C. 251 error is already present.

As Applicant has stated in the initial filing of the Reissue application, a 35 U.S.C. 251 error is already present and applicant should be allowed to correct these other typographical errors. The Examiner cited 35 U.S.C. 132(a) and maintained that the requested correction from "alkinyl" to "alkynyl" constitutes new matter. Applicant respectfully disagrees because the requested correction is for the purpose of correcting an obvious mistake. "An amendment to correct an obvious error does not constitute new matter where one skilled in the art would not only recognize the existence of error in the specification, but also the appropriate correction." MPEP 2163.07. Here, the original disclosure recites alkyl, alkenyl and "alkinyl" groups. It is well known that alkyl is a saturated hydrocarbon group, and alkenyl group contains

double carbon bond, while alkynyl contains a triple bond. Alkynyl is a variant spelling of alkynyl, as confirmed by printouts from Answers.com. This amendment is not new matter because one form of equivalent spelling is merely being exchanged for another. Thus, the requested amendment to change "alkynyl" to "alkynyl" does not constitute new matter and its entry is respectfully requested.

## **II. Claim Rejections – 35 U.S.C. 112**

Claims 1, 3-14 stand rejected under 35 U.S.C. 112 second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The Examiner also states that "[a]lkynyl has no support." For reasons set forth in the previous section, Applicant should be allowed to correct the term "alkynyl." Once the term "alkynyl" is changed to "alkynyl" in the Specification, the same term "alkynyl" as used in the claims would be well supported. The meaning of the term "alkynyl" is well known in the art, and Applicant is not required to provide examples or definition to well known terms such as "alkynyl."

The term "in vivo" is rejected for lack of support. Applicant traverses this rejection as the term is inherently supported by the specification. Nevertheless, Applicant has deleted the term "in vivo."

Claims 1, 3-14 stand rejected under 35 U.S.C. 112 second paragraph as being indefinite. The Examiner maintained that the claim language leaves the impression that the solutions of (a) and (b) are added in addition to the composition of claim 1. Applicant has now amended claims 3-5 and 9-11 for purpose of clarification. Claims 6-8 and 12-14 recited the composition according to claim 1 that is prepared by mixing components (a) and (b). Applicant respectfully traverses the Examiner's position that these claims are confusing because the components (a) and (b) are included as further explanation to the means by which the compositions are prepared, but not as limitations to the composition. Withdrawal of the rejections under 35 U.S.C. 112 second paragraph is respectfully requested.

## **III. Claim Rejection under 35 U.S.C. § 102(b)**

Claim 2 stands rejected under 35 U.S.C. § 102(b) over Fenn or Dolan. Applicant respectfully disagrees because not all claim limitations of claim 2 as amended are taught by these references. Fenn and Dolan merely report investigational use of phosphonates with phosphates at extremely dilute concentrations that do not constitute what is now claimed as "enhanced growth stimulating effective amounts." Applicant has also amended claim 2 to recite a further limitation that both first and second salts are present at a concentration that is at least 20 mM. This limitation contrasts the respective teachings of Fenn and Dolan, where the concentrations of the salts are at less than 1 mM. See Table 4 of Fenn and Table 4 of Dolan. Thus, Fenn and Dolan are distinguishable from the present claims at least based on the concentration of the salts. Withdrawal of these 102(b) rejections is respectfully requested.

Claims 1-14 stand rejected under 102(e) as being anticipated by U.S. Patent 5,865,870 issued to Hsu ('870 patent). Applicant wishes to bring to the attention of the Examiner regarding the respective priority dates of the present application and the cited prior art. The '870 patent issued to Hsu was filed on October 27, 1997, which is a CIP of an application Serial # 788,860 filed January 23, 1997. The present patent under reissue examination was a divisional application of Application serial # 08/812,865, which was filed March 2, 1997, which is a CIP of Application 08/705,594 filed on August 30, 1996.

The Application 08/705,594 disclosed compositions and methods for controlling fungal diseases. The Application 08/705,594 further disclosed that the compositions also have fertilizer effects, which supports the presently claimed growth stimulating effects. Thus, the priority of this reissue application may be traced back to the filing date of the Application 08/705,594, August 30, 1996, which is earlier than the earliest priority date of the '870 patent. Therefore, US 5,865,870 is not prior art.

#### **IV. Claim Rejection—Double Patenting**

Claims 1-2 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 5-6 of U.S. Patent No. 5,736,164, over claims 1, 2, 5 and 6 of U.S. Patent No. 5,925,383 and over claims 3,

4, 11 and 13 of U.S. Patent No. 6,338,860.

Applicants respectfully traverses these rejections because the claim limitation of growth stimulating effective amount of the claimed composition distinguishes the present claims 1-2 from the cited patents. However, should the Examiner maintain the double patenting rejection, Applicant has enclosed a Terminal Disclaimer for each cited patent, which by established law suffices to overcome such a rejection. Withdrawal of the double patenting rejection is respectfully requested.

For the above reasons, Applicant's attorney respectfully submits that the claims are worthy of allowance. Applicant believes no additional fees are due, however, if any additional fee is deemed necessary in connection with this Amendment and Response, please charge Deposit Account No. 12-0600.

Respectfully submitted



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